Filed 10/11/16 Croteau v. Harbach CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RANDY CROTEAU, Plaintiff and Appellant, v. PAUL J. HARBACH, as Co-Trustee, etc., et al., Defendants and Respondents.	E061370 (Super.Ct.No. RIC1110730) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Gary A. Dordick, A Law Corporation, Gary A. Dordick; Russell & Lazarus and Marc Lazarus for Plaintiff and Appellant.

Demler, Armstrong & Rowland, Terry A. Rowland and David A. Ring for Defendants and Respondents.

Plaintiff and appellant Randy Croteau (hereafter referred to as plaintiff) was injured while engaged in painting a house owned by the Harbach Family Trust.[1] Plaintiff sought damages for, among other things, the emotional distress he suffered because his inability to work and the resultant lack of income caused him to separate from his wife. The trial court excluded this evidence under Evidence Code section 352 because it determined that it would be unduly prejudicial and too time-consuming. It also held that any claim for damages based on the separation would be too remote and too speculative. On appeal, plaintiff contends that the exclusion was erroneous and that reversal is required.

We agree that the evidence should not have been excluded. However, because plaintiff has not met his burden to demonstrate prejudice, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was self-employed as a licensed painting contractor and had worked as a painter most of his adult life. On or about February 3, 2011, while engaged in painting a house in Hemet owned by the Harbach Family Trust, plaintiff fell into a ravine on the property when the wooden handrail on a bridge spanning the ravine gave way. Plaintiff landed on his left shoulder and suffered a torn rotator cuff. The injury caused severe pain in plaintiff's left shoulder and arm and in his neck, as well as numbness and tingling in the fingers of his left hand, and caused him to have very limited use of his left arm and hand. Plaintiff is left handed and was unable to work as a painter.

---

[1] Judgment was entered against defendants and respondents Paul J. Harbach and Monty R. Feyen in their capacity as trustees of the trust.

Plaintiff had married his wife, Kim, about two years before the accident. Kim's two children from a prior marriage lived with them, as did plaintiff's two sons from a prior marriage. One of plaintiff's sons was apparently severely disabled by autism. Because plaintiff was unable to work after the accident, within several months he and his wife were unable to pay the rent and were evicted. Plaintiff and his wife separated at that point.

Plaintiff underwent two operations to repair the rotator cuff and alleviate the pain in his arm and shoulder and a third operation on his neck for herniated discs, but as of the trial, plaintiff was still disabled by the injury and had to wear a brace. He had sought work but had not been successful.

A jury found defendants 65 percent liable for plaintiff's injury and returned a gross verdict of $317,000 in economic damages and $53,000 in past and future noneconomic damages. Plaintiff filed a timely notice of appeal.

LEGAL ANALYSIS

1.

THE ISSUE WAS PRESERVED FOR APPEAL

Defendants assert that because plaintiff has raised an issue pertaining to the adequacy of damages, he was required to address it in a motion for a new trial in order to preserve the issue for appeal. Defendants rely on *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101. That case holds that where ascertainment of the amount of damages requires resolution of conflicts in the evidence or depends on credibility of witnesses, the award may not be challenged for inadequacy

or excessiveness for the first time on appeal. (*Id.* at p. 122.) The issue plaintiff raises, however, is the exclusion of evidence, not the adequacy of the damages on grounds.

Moreover, plaintiff did file a new trial motion which raised the same issue he now argues on appeal. Defendants contend that the motion did not suffice to preserve the issue for appeal because the notice of intent to move for a new trial was not timely filed. However, as they also note, the trial court denied the motion both on timeliness grounds and *on its merits*. Accordingly, even if the issue raised on appeal could be characterized as a claim that damages were inadequate, the issue was preserved for appeal.

2.

THE TRIAL COURT'S EXCLUSION OF PLAINTIFF'S EVIDENCE WAS AN ABUSE OF DISCRETION BUT WAS NOT PREJUDICIAL

Standard of Review

A trial court's determinations as to the admissibility of evidence in general and as to its exclusion under Evidence Code section 352 (hereafter section 352) are reviewed for abuse of discretion. (*People v. Lee* (2011) 51 Cal.4th 620, 643.) A trial court's discretionary ruling will be disturbed on appeal only upon a clear showing of abuse and a miscarriage of justice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) However, the court's discretion is not unlimited; rather, it "must be exercised within the confines of the applicable legal principles." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an

'abuse' of discretion. [Citation.]" (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

The Disputed Evidence

Before the trial began, the defense sought a ruling excluding evidence of general damages based on the "loss" of plaintiff's marriage. Defense counsel argued that such a loss is not a compensable element of damages in a "garden-variety PI case." He compared this case to *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916.[2] Plaintiff's attorney argued that plaintiff's unwanted separation from his wife is a compensable item of general damages under Civil Code section 3333.[3] He stated that plaintiff and his wife had been married about three years when the injury occurred. He explained that because plaintiff was unable to work, they were eventually evicted from the house because they were no longer able to pay the rent. They were unable to afford another rental for a family of six. Plaintiff's wife and her two children were able to move in with her father, but he could not accommodate plaintiff and his two sons. Plaintiff and his wife separated at that point, but as of the trial date, they were not divorced. Plaintiff's attorney then stated, "So I'm not saying they got divorced because of the accident because, Lord knows, when a marriage fails, there's a lot of things that go into it and we don't need to tie up this courtroom with all these little things that go on in a marriage. But as to the issue of losing the house and her separating at that time with her two kids

[2] We discuss *Molien v. Kaiser Foundation Hospitals, supra*, 27 Cal.3d 916, below.

[3] We discuss this statute below.

because they got evicted because he couldn't pay the rent, which he had always been able to do, is relevant damages."

After taking the issue under submission, the court ruled that plaintiff could "discuss" the matter of the separation as an element of noneconomic damages. Accordingly, in his opening statement, counsel informed the jury that because plaintiff was unable to work after the accident and was unable to pay the rent, plaintiff and his family were evicted from their home and had nowhere to go, and he was forced to separate from his wife. He stated, "[Y]ou're going to hear testimony from [plaintiff and his wife] about how this accident affected his family and the part of the damages that have . . . come from those losses."

Following opening statements, the court informed counsel that it had changed its mind because it now had the benefit of having heard from both sides what they expected the evidence to show. The court said that it had concluded that "there are a myriad of different reasons for why two adults may make those decisions when faced with financial hardship. They are value decisions . . . that may be made differently by other people similarly situated. I believe that . . . the fact that they were living separately, is highly prejudicial. I believe that . . . the inquiry into why, how, and what alternatives were available to them would involve an undue consumption of time. And I find that . . . its probative value as to noneconomic damages is minimal, at best, because it is a remote and, at best, a tertiary or quaternary effect of the injury."

The court then invited argument from counsel. Plaintiff's attorney pointed out that defense counsel had made no reference to the issue in his opening statement while

plaintiff's counsel had done nothing more than state the same facts that he had previously stated to the court and that it would be highly prejudicial to plaintiff if he were not allowed to adduce evidence he had referred to in his opening statement.

The court adopted its tentative ruling. It said that it accepted that plaintiff's counsel "could absolutely prove everything that [he] said." However, it concluded that the information was highly prejudicial and not particularly probative "of the issues that are important in this case." However, the court stated that if plaintiff's counsel could find a case on point that held to the contrary, it would "follow the law." It also offered to give a curative instruction as to why plaintiff had failed to produce any evidence on the question of damages resulting from the separation. The court denied plaintiff's motion for a mistrial.

Plaintiff's attorney revisited the issue before plaintiff testified. He analogized the damages he sought to those available in a claim for loss of consortium and questioned the court's reasoning as to why it considered evidence of similar damages prejudicial in the context of a married person's claim for personal injuries, when such evidence would unquestionably be admissible in a loss of consortium claim by the person's spouse. The court stood by its earlier ruling, but reiterated that it would reconsider it if counsel provided him with a case on point. The court accepted counsel's offer of proof that both plaintiff and his wife would testify "to the loss of the relationship, sexual and physical and emotional and all those things," as well as the fact that their estrangement was permanent. Ultimately, the court allowed counsel to ask "some very limited questions

about the fact that they separated and when they separated, but it ends there. Not why, not how they feel about the separation, none of those things."

Plaintiff's attorney did elicit from plaintiff and his estranged wife the fact that they separated after losing the house, but, in keeping with the court's ruling, did not elicit any testimony as to plaintiff's emotional response to the separation.

Legal Analysis

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Here, the trial court excluded plaintiff's evidence that his relationship with his wife was impaired as a result of the injury he sustained and that he suffered mental and emotional distress as a result of the "loss" of his marriage because (1) the inquiry into the reasons for the separation would be "highly prejudicial" and would involve undue consumption of time, and (2) the probative value of the evidence as to noneconomic damages was minimal, "because it is a remote and, at best, a tertiary or quaternary effect of the injury." We will address each ground separately.

The Remoteness of the Separation from the Underlying Cause of the Injury

Plaintiff contends that mental and emotional distress are compensable as general damages in personal injury cases if such damages are "causally related" to the accident. He contends that the trial court erred in finding that the evidence of any emotional distress resulting from the separation should be excluded because it was too remote.

Defendants appear to contend that evidence of the breakup of a marriage is not admissible as an item of damages as a matter of law. As we discuss, plaintiff's view that such losses need only be "causally related" to the underlying negligent act is too simplistic. However, defendants are mistaken that such losses are not compensable under any circumstances.

Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by the code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." Tort damages include noneconomic, or general, damages, which compensate not only for physical pain and suffering but also for mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, humiliation and emotional distress. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1332, citing *Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892-893.) Not only is mental suffering compensable, it frequently constitutes the principal element of tort damages. (*Capelouto*, at p. 893.) Accordingly, "'[i]f a cause of action is otherwise established, it is settled that damages may be given for mental suffering naturally ensuing from the acts complained of.'" (*Id.* at p. 892.)

Mental suffering may include many components, including loss of enjoyment of life. (*Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 763-764.) There is no comprehensive list of what types of losses fall under the rubric of "loss of enjoyment," and we have found no cases that directly address an issue pertaining to the scope of such losses or which address interference in a marriage as a component of such damages.

However, in *Loth*, the court noted that the unmarried plaintiff sought compensation for, among other things, resulting limitations on her social activities, including loss of "'sexual spontaneity.'" (*Id*. at p. 761.) If interference with social and sexual activities and relationships qualifies as compensable loss of enjoyment of life, then interference with family or marital relationships qualifies as well.

Moreover, plaintiff's analogy to loss of consortium is apt. In *Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, the California Supreme Court established a cause of action for loss of consortium under California law, overruling prior cases in which it had rejected such a cause of action. (*Id.* at pp. 385, 408.) It held that "in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party." (*Id*. at p. 408.) In reaching that conclusion, the court held that there is a substantial likelihood that an injured adult is married and that his or her spouse will suffer personal losses as a result of a serious injury. (*Id*. at pp. 399-400.) Compensable losses under a claim for loss of consortium include "loss of conjugal fellowship," i.e, love, companionship, affection and society, loss of sexual relations and the opportunity for procreation, loss of the moral and emotional support afforded by the injured spouse to the noninjured spouse, physical and emotional pain and suffering, and the loss of the injured spouse's assistance in operating and maintaining the family home. (*Id*. at pp. 385, 386, 404-406, 409 & fn. 31.) The court noted that caring for an injured husband may transform "a happy wife into a lonely nurse." (*Id.* at p. 405.) Clearly, the court recognized that impairment of the marriage can naturally ensue from injury to one of the spouses.

Furthermore, in reaching its conclusion, the court stated that the injured *husband's* damages included being precluded from a "full enjoyment of his marital state," and held that the wife had an analogous claim for such damages. (*Rodriguez v. Bethlehem Steel Corp., supra,* 12 Cal.3d at p. 405.) Because the court recognized that both the injured spouse and the noninjured spouse might suffer emotional distress as a result of the impact the injury has on their marriage, we conclude that a negative impact on the marriage itself and on the emotional state of both spouses is a foreseeable consequence of injury to a married person. Accordingly, we reject defendants' contention that the breakup of a marriage cannot "naturally ensue" from a physical injury. We also reject their contention that public policy "weighs against tortfeasor liability for such matters of the heart except where loss of consortium is claimed by the otherwise uninjured spouse." The factors that support the loss of consortium cause of action for the uninjured spouse apply equally to the injured spouse.

Nevertheless, we reject plaintiff's assertion that nothing more than a causal relationship between defendants' negligence and the breakup of his marriage is necessary in order to entitle him to compensation for the emotional distress resulting from the breakup. Civil Code section 3333 limits recovery to damages that were *proximately* caused by the breach of the obligation—in this case, the breach of defendants' duty to maintain their property in a safe condition. Proximate cause has two aspects. One is cause in fact. An act is a cause in fact if the injury would not have occurred but for the defendant's act or omission, or if the act or omission was a substantial factor in causing the plaintiff's injury. (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th

339, 352.) If the harm would have occurred without the act or omission, the act or omission is not a substantial factor. (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187.)

The second aspect of proximate cause serves to place additional limitations on liability other than simple causality, based on public policy considerations. (*State Dept. of State Hospitals v. Superior Court*, *supra*, 61 Cal.4th at p. 353.) "'"These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.'" [Citation.]' [Citation.] As Witkin puts it, '[t]he doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, the defendant will nevertheless be absolved because of the manner in which the injury occurred. . . . Rules of legal cause . . . operate to relieve the defendant whose conduct is a cause in fact of the injury, where it would be considered unjust to hold him or her legally responsible.' [Citation.]" (*Ibid.*)

It is arguable that the emotional distress plaintiff alleges is too remote from the underlying negligence. Loss of enjoyment of life typically involves impairments that directly result from the physical injury. (See *Loth v. Truck-A-Way Corp.*, *supra*, 60 Cal.App.4th at p. 763, and cases cited therein.) Similarly, loss of consortium claims typically arise because the physical injury and disability suffered by one spouse directly impacts the marriage and causes losses to the other spouse. (See, e.g., *Rodriguez v.*

Bethlehem Steel Corp., supra, 12 Cal.3d at pp. 385-387.) The only case we are aware of in which the breakup of a marriage was found at least potentially to be a foreseeable consequence of a negligent act is *Molien v. Kaiser Foundation Hospitals*, *supra*, 27 Cal.3d 916. That case is inapposite, because the nature of the negligent act in that case was such that devastating consequences to the plaintiff's marriage were entirely foreseeable and not remote. Here, in contrast, plaintiff's separation from his wife was not a direct result of the specific negligence alleged in the complaint but was rather part of a cascading series of events—his injury prevented him from working, which led to loss of income, which led to eviction from his home and to separation from his wife.[4] The

---

[4] In *Molien v. Kaiser Foundation Hospitals*, *supra*, 27 Cal.3d 916, the plaintiff's wife was incorrectly, and allegedly negligently, diagnosed as having syphilis. Her doctor told her to tell her husband so that he could be tested and treated as well. Testing showed that plaintiff did not have syphilis. However, plaintiff's wife became suspicious that plaintiff had engaged in extramarital sex. Tension and hostility arose between the two, causing the breakup of their marriage and the initiation of divorce proceedings. Plaintiff sued for negligent infliction of emotional distress and for loss of consortium. The case was dismissed after the trial court sustained demurrers to both causes of action. (*Id*. at pp. 919-921.) In reversing the judgment with respect to the loss of consortium claim, the California Supreme Court did not address the contention that the divorce was proximately caused by the doctor's negligence. Rather, it discussed only whether a claim for loss of consortium must be based on physical injury to the plaintiff's spouse. The court concluded that emotional injury resulting in loss of consortium is also actionable. (*Id*. at pp. 931-933.)

As we have stated above, *Molien v. Kaiser Foundation Hospitals*, *supra*, 27 Cal.3d 916, is distinguishable in that the damage to the plaintiff's marriage in that case was foreseeable as a direct consequence of the defendant's negligence. That is not the case in this instance. We emphasize that in this case, we do not hold that plaintiff himself had a cause of action for loss of consortium. Nor do we establish a tort for damages resulting from loss of marriage. Rather, we hold only that in a proper case, a cause of action for negligence may include a claim for general damages that includes the emotional distress based on foreseeable consequences to the plaintiff's family and marital relationships.

emotional distress he suffered as a result of the separation from his wife is an additional step removed from defendants' negligent maintenance of their property. Consequently, even though defendant's negligence may have been a substantial factor in the breakup of the marriage, it may be considered too remote to be a proximate cause. However, "there is no bright line demarcating a legally sufficient proximate cause from one that is too remote." (*People v. Roberts* (1992) 2 Cal.4th 271, 320, fn. 11.) For that reason, unless the facts are undisputed and lead only to one conclusion, proximate cause is a question for the jury. (*State Dept. of State Hospitals v. Superior Court*, *supra*, 61 Cal.4th at p. 353; *Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205.) Because the facts are disputed, we cannot say that the injury is or is not too remote as a matter of law.

"*Prejudicial*" *and* "*Inflammatory*"

As noted above, the court considered the proffered evidence "inflammatory" and "prejudicial." The reasons the court gave are (1) the myriad reasons that a couple might decide to separate when faced with financial hardship and (2) the undue consumption of time that litigating the issue would entail. In weighing these factors against the probative value of the evidence, the court held that the probative value of the evidence was minimal "because it is a remote and, at best, a tertiary or quaternary effect of the injury."

Evidence is prejudicial within the meaning of section 352 "if it '"uniquely tends to evoke an emotional bias against a party as an individual"' [citations] or if it would cause the jury to '"'prejudg[e]' a person or cause on the basis of extraneous factors"' [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 475.) It is also prejudicial if "'it is of such nature as to inflame the emotions of the jury, motivating [jurors] to use the

information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.) To be *unduly* prejudicial, as required by section 352, it must pose "an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal.4th 141, 188.) Evidence that a couple separated following an injury and the resulting financial hardship does not meet that definition.

We are also not persuaded that presentation of this evidence would have been unduly time-consuming. Plaintiff and his estranged wife both testified very briefly to establish that they had separated following their eviction, and it would have taken only a few more questions to plaintiff to establish his emotional reaction to the separation. Although defendants argued that there are many reasons why a couple might separate, they did not make any offer as to how they would seek to establish the existence of such other reasons. They did not, for example, state that they would call multiple witnesses to testify to other problems in the marriage.[5] Accordingly, the court had no factual basis for concluding that presentation of this evidence would entail lengthy testimony.

---

[5] On appeal, defendants state that evidence adduced at trial, that within months after the separation from his wife plaintiff was courting another woman and attempting to impress her by misrepresenting his financial status and physical activities, "suggest[s]" that "there would have been a wealth of marital issues to explore." Perhaps, but we view the trial court's exercise of discretion based on the facts made known to it at the time of the ruling, not based on information that was developed later. (*People v. Hernandez*

[footnote continued on next page]

It is, however, the court's conclusion that the evidence had only minimal probative value because the separation and plaintiff's emotional distress from the separation were too remote from the injury that persuades us that it abused its discretion. In effect, the court determined that defendants' negligence was not the proximate cause of either the separation or plaintiff's resulting emotional distress. However, if the facts are in dispute, as they were in this case, it is the jury's function to determine proximate cause. (*State Dept. of State Hospitals v. Superior Court*, *supra*, 61 Cal.4th at p. 353; *Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at p. 1205.) By usurping the jury's function, the trial court abused its discretion.

Plaintiff Has Not Shown That the Error Was Prejudicial

Errors in the exclusion of evidence are reviewed under the "reasonable probability" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Gonzales* (2011) 51 Cal.4th 894, 924.) Under that test, an error requires reversal only if there is a reasonable probability that the outcome would have been more favorable to the affected party in the absence of the error. (*Watson*, at p. 836.) A "reasonable probability" does not mean more likely than not, but merely "a reasonable chance, more than an abstract possibility." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics omitted.)

[footnote continued from previous page]
[footnote continued from previous page]
(1999) 71 Cal.App.4th 417.) Defendants did not make an offer of proof as to such potential issues before the trial court ruled on their motion to exclude the evidence.

We digress to address plaintiff's claim that he is entitled to reversal without regard to prejudice because the trial court excluded an entire category of damages and precluded him from establishing an essential element of his claim, i.e., his emotional distress damages caused by the breakup of his marriage. Automatic reversal is required only when there is an erroneous exclusion of "*all* evidence relating to a claim." (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114.) When a trial court erroneously excludes all evidence relating to a claim, the error is reversible per se "because it deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice." (*Ibid.*) In this case, however, the court did not exclude all evidence of pain and suffering. The jury was instructed that it could award damages for pain and suffering and for loss of enjoyment of life. Plaintiff presented evidence about physical activities he had enjoyed before the injury but was unable to engage in since the injury, and the jury did hear that plaintiff's family life was adversely affected by the injury and its aftermath. Accordingly, because the jury was prevented from considering only one aspect of plaintiff's alleged general damages, automatic reversal is not required.

On appeal, it is plaintiff's burden to demonstrate prejudice within the meaning of *Watson, supra*, 46 Cal.2d 818. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.) Plaintiff first contends that exclusion of evidence so as to deprive a party of the "legitimate force and effect of material evidence" is "almost always considered reversible error." The case he cites in support of that contention, *Fuentes v. Tucker* (1947) 31 Cal.2d 1, does not address the erroneous exclusion of evidence, but rather

whether it is error to permit the *admission* of evidence in support of a fact that is not contested because the opposing party has admitted it. The phrase plaintiff quotes appears in the following sentence: "The introduction of evidence of admitted facts is permissible in cases where the admission is ambiguous in form or limited in scope or where, during the trial of a case, a party seeks to deprive his opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact." (*Id*. at p. 7.) That holding is not relevant here, and it does not, in any event, address the question of prejudice from the erroneous exclusion of material evidence. In support of the second proposition, that denial of the right to offer relevant and competent evidence "is almost always considered reversible error," plaintiff offers neither context nor authority, except for the obsolete 3 Witkin, California Evidence (3d ed. 1986), section 1681, page 1642. Such a quotation, in the absence of context, is not persuasive.

Plaintiff next contends that "absent evidence of the impairment of the marital relationship and permanent estrangement, [his] damages lacked an essential human dimension," leaving the jury with the impression that he was "an uncaring spouse." This "undercut his entire case by making [him] an undeserving litigant." He points out that despite evidence that he had suffered pain after the accident and underwent several surgeries and extensive physical therapy, he was awarded only $53,000 in noneconomic damages.

We are not persuaded that the absence of this single item of evidence caused plaintiff's damages to lack a "human dimension." Plaintiff testified that his life had been affected "in every way possible." Plaintiff, his wife and a friend all testified about

activities plaintiff had enjoyed before the accident, including activities with his wife and family that he was no longer able to engage in. Plaintiff testified about his frustration at not being able to find work after the accident. All of these things showed plaintiff's humanity. Furthermore, even if it was not spelled out for them, jurors could infer that the separation caused some mental or emotional pain to both spouses. Although the jury was not specifically instructed that it could take that circumstance into consideration in arriving at an award of damages for mental and emotional pain and loss of enjoyment of life, it was also not instructed by the court that it could *not* do so.

Second, the record gives reason to believe that if the jury had a jaundiced view of plaintiff, it did not result from the lack of evidence that he suffered from the breakup of his marriage but rather resulted from evidence that greatly undermined his credibility. First, a key element of plaintiff's economic damages was his business losses. However, he was unable to document his claimed business losses, as confirmed by his own accounting expert, and he admitted that some of his responses to a request to produce business documents were "partially" untruthful. Second, although plaintiff had an option to buy the house he and his wife were renting at the time of the accident and claimed that he would have been able to exercise that option but for his lack of income after the accident, he was ultimately forced to admit that even without the loss of income resulting from the accident, he did not know whether he had the money for a 10 or 20 percent down payment or whether he would have qualified for financing. Indeed, his own accounting expert testified that plaintiff's business records would not have been sufficient documentation of his income to permit him to obtain a bank loan.

Third, despite his claim of continuing disability, after the accident plaintiff reported on his Facebook page about his ongoing strenuous physical activities, including hunting and fishing, snowmobiling, bow shooting and working out. He explained those posts in various ways, including that although he went with friends who were hunting or shooting, he did not participate, and that some of the posts were in fact written by his brother. He also explained that several months after his separation from his wife, he began courting a woman he "met" on Facebook. In order to woo her, he concealed his disability and misrepresented that he had engaged in a number of strenuous pursuits. He also misrepresented his financial condition and the fact that he was no longer working, and claimed to be selling his house so he could move back to Michigan, where he was originally from, and where the woman lived. He also concealed from her the fact that he was still married. This evidence almost certainly caused the jury to view plaintiff as less than honest, and we are not persuaded that it is reasonably probable that the jury would have awarded additional damages if he had been permitted to testify about his emotional distress resulting from the separation.

DISPOSITION

The judgment is affirmed. Defendants and respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

HOLLENHORST

Acting P. J.

CODRINGTON

J.